

Alan L. Sullivan (3152)
Elisabeth M. McOmber (10615)
Snell & Wilmer, L.L.P.
15 W. South Temple, # 1200
Salt Lake City, UT 84101-1531
T: (801) 257-1955
F: (801) 257-1800
asullivan@swlaw.com
emcomber@swlaw.com

*Attorneys for Defendant
Brown Shoe Company, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

<p>EDIZONE, LLC, Plaintiff, vs. MERCK & CO., INC., SCHERING-PLOUGH HEALTHCARE PRODUCTS, INC., BROWN SHOE COMPANY, INC., WAL-MART STORES, INC., TARGET CORPORATION, WALGREEN CO., and DOES 1 – 50, Defendants</p>	<p>DEFENDANT BROWN SHOE'S ANSWER AND DEFENSES Case No.: 2:10-cv-00855-TS Judge Ted Stewart</p>
---	---

Defendant Brown Shoe Company, Inc. (“Brown Shoe”) hereby answers and otherwise responds to the Complaint of Plaintiff EdiZONE, LLC (“EdiZONE”) as follows:

PARTIES AND JURISDICTION

1. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

2. Brown Shoe responds to the allegations in Paragraph 2 of the Complaint as follows:

(a) Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2(a) of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

(b) Brown Shoe admits that it is a New York corporation with a principal place of business outside of the state of Utah. Brown Shoe also admits that it is a licensee of certain Dr. Scholl's trademarks used in commerce in connection with footwear. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2(b) of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

(c) Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2(c) of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

(d) Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2(d) of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

3. Brown Shoe admits that it distributes footwear throughout the United States,

and Brown Shoe does not contest that this Court has personal jurisdiction over Brown Shoe for the purpose of this action only. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

4. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

5. Brown Shoe admits that this Court has subject matter jurisdiction over the patent infringement claims, and Brown Shoe admits that venue of this action is proper with respect to Brown Shoe for the purposes of this action only. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

GENERAL ALLEGATIONS

6. Brown Shoe responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

7. Brown Shoe responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

8. Brown Shoe responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

9. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

10. Brown Shoe responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

11. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

12. Brown Shoe responds that the document attached as Exhibit 1 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 12 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

13. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

14. Brown Shoe is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 14 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

15. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

16. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

17. Brown Shoe responds that the document attached as Exhibit 2 to the Complaint speaks for itself and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

18. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

19. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

20. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

21. Brown Shoe is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 21 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

22. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

23. Brown Shoe responds that the document attached as Exhibit 3 to the Complaint speaks for itself, and further responds that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

24. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

25. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

26. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

27. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 27 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

28. Brown Shoe is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 28 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

29. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

30. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

FIRST CLAIM FOR RELIEF
(Breach of License Agreement
Against DR. SCHOLL'S for Failure to Mark and Timely Cure)

31. Brown Shoe incorporates by reference its response to all other allegations of the Complaint as if fully restated herein.

32. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

33. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 33 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

34. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

35. Brown Shoe is without knowledge or information sufficient to form a belief as to

the truth of the allegations contained in Paragraph 35 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

36. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

37. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 37 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

38. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 38 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

39. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 39 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

40. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 40 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

SECOND CLAIM FOR RELIEF
(Breach of License Agreement
Against DR. SCHOLL'S for
Exceeding Field of Use with Whole Shoes)

41. Brown Shoe incorporates by reference its response to all other allegations of the Complaint as if fully restated herein.

42. Objection in that it is not understood what is meant by “whole shoes.”¹ Insofar as understood, admitted.

43. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs. In particular, the Brown Shoe website does not currently present the text quoted above, and Brown Shoe does not currently know whether the text quoted above was used on February 26, 2007.

44. Insofar as Paragraph 44 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 44 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

45. Insofar as Paragraph 45 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 45 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs..

THIRD CLAIM FOR RELIEF
(Patent Infringement
Against DR. SCHOLL'S and BROWN SHOE for
Use of Massaging Gel in Whole Shoes)

46. Brown Shoe incorporates by reference its response to all other allegations of the Complaint as if fully restated herein.

47. Insofar as Paragraph 47 pertains to Brown Shoe, denied. Otherwise, Brown Shoe

¹ This Objection is asserted throughout the Answer where appropriate.

is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 47 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

48. Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations incorporated by Paragraph 48 of the Complaint and, therefore, denies each and every allegation therein leaving Plaintiff to its proofs.

49. Insofar as Paragraph 49 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 49 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

50. Insofar as Paragraph 50 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 50 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

51. Insofar as Paragraph 51 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 51 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

52. Insofar as Paragraph 52 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 52 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

FOURTH CLAIM FOR RELIEF
(Patent Infringement
Against DR. SCHOLL'S and RETAILERS for
Supplying and Selling Massaging Gel without a License)

53. Brown Shoe incorporates by reference its response to all other allegations of the Complaint as if fully restated herein.

54. The Fourth Claim does not apply to Brown Shoe and therefore no response should be needed with respect to the allegations in Paragraph 54. To the extent a response is warranted, Brown Shoe responds as follows. Insofar as Paragraph 54 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 54 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

55. The Fourth Claim does not apply to Brown Shoe and therefore no response should be needed with respect to the allegations in Paragraph 55. To the extent a response is warranted, Brown Shoe responds as follows. Insofar as Paragraph 55 pertains to Brown Shoe, denied. The allegations of this Paragraph 55 are contradicted by the allegations of the First Claim for Relief. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 55 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

56. The Fourth Claim does not apply to Brown Shoe and therefore no response should be needed with respect to the allegations in Paragraph 56. To the extent a response is warranted, Brown Shoe responds as follows. Insofar as Paragraph 56 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in Paragraph 56 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

57. The Fourth Claim does not apply to Brown Shoe and therefore no response should be needed with respect to the allegations in Paragraph 57. To the extent a response is warranted, Brown Shoe responds as follows. Insofar as Paragraph 57 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 57 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

58. The Fourth Claim does not apply to Brown Shoe and therefore no response should be needed with respect to the allegations in Paragraph 58. To the extent a response is warranted, Brown Shoe responds as follows. Insofar as Paragraph 58 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 58 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

59. The Fourth Claim does not apply to Brown Shoe and therefore no response should be needed with respect to the allegations in Paragraph 59. To the extent a response is warranted, Brown Shoe responds as follows. Insofar as Paragraph 59 pertains to Brown Shoe, denied. Otherwise, Brown Shoe is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 59 of the Complaint, and therefore denies those allegations leaving Plaintiff to its proofs.

AFFIRMATIVE AND OTHER DEFENSES

Brown Shoe offers the following defenses to EdiZONE's Third and Fourth Claims, the

only claims which arguably contemplate Brown Shoe, and reserves the right to introduce any of the following defenses, or any other defenses that arise, as counterclaims at a later time.

**First Defense:
Patent Invalidity**

1. The claims of the '759 patent are invalid for failing to meet the requirements of one or more of the provisions of 35 U.S.C. §§ 102, 103, and 112.

**Second Defense:
Noninfringement**

2. Brown Shoe has not infringed and is not liable for any infringement of any valid claim of the '759 patent.

**Third Defense:
Laches, Waiver, and Estoppel**

3. Plaintiff's claims are barred in whole or in part by the doctrines of waiver, laches, estoppel, abandonment, and unclean hands.

Fourth Defense

4. Plaintiff's Complaint fails to state a claim against Defendant upon which the relief sought, or any relief, can be granted.

Fifth Defense

5. Plaintiff's claims, or some of them, are barred or limited by contract.

Sixth Defense

6. Plaintiff's claims, or some of them, are barred, in whole or in part, by Plaintiff's own material breaches of contract.

Seventh Defense

7. Plaintiff's claims, or some of them, are barred by the doctrines of mistake, accord and

satisfaction.

Eighth Defense

8. Plaintiff's claims, or some of them, are barred by Plaintiff's failure to mitigate their damages, if any.

Ninth Defense

9. Plaintiff's claims, or some of them, are barred by the economic loss doctrine.

Tenth Defense

10. Plaintiff's requests for relief, or some of them, are barred because Plaintiff has an adequate remedy at law.

Eleventh Defense

11. Plaintiff's damages, if any, were the result of events, factors, occurrences or conditions which were in no way caused by Defendant and for which Defendant may not be held liable.

Twelfth Defense

12. Plaintiff's claim for punitive damages against Defendant is barred because of the Plaintiff's failure to plead the necessary elements against Defendant to sustain an award of punitive damages and, in particular, the claim fails to meet the requirements of Utah Code §78B-8-201.

Thirteenth Defense

13. Defendant reserves the right to amend, modify, or supplement these defenses as may be necessary based on discovery in this matter.

PRAYER FOR RELIEF

Brown Shoe denies that Plaintiff is entitled to any relief sought against Brown Shoe in the Complaint.

WHEREFORE, Brown Shoe demands that Plaintiff's claims be dismissed, with prejudice and that it be awarded nothing thereby, that Brown Shoe be awarded its costs and attorneys' fees incurred herein, and that the Court order such other and further relief as may be necessary and appropriate in the circumstances.

November 22, 2010

Respectfully submitted.

/s/ Elisabeth M. McOmber

Alan L. Sullivan
Elisabeth M. McOmber
Snell & Wilmer, L.L.P.
15 W. South Temple, # 1200
Salt Lake City, UT 84101-1531
(801) 257-1955 Telephone

Daniel A. Boehnen, Of Counsel (*motion for Pro Hac Vice admission to be submitted*)

Jessica L. Lunney, Of Counsel (*motion for Pro Hac Vice admission to be submitted*)

McDonnell Boehnen Hulbert & Berghoff LLP
300 South Wacker Drive, Suite 3100
Chicago, Illinois 60606
(312) 913-0001 Telephone
(312) 913-0002 Facsimile

Attorneys for Defendant Brown Shoe Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 2010, I electronically filed the foregoing **DEFENDANT BROWN SHOE'S ANSWER AND DEFENSES** through the CM/ECF System, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Casey K. McGarvey
EdiZONE, LLC
123 East 200 North
Alpine, UT 84004
casey@edizone.com

Clifford J. Payne
Morgan Minnock Rice & James
136 S. Main Street, 8th Floor
Salt Lake City, UT 84101
cpayne@mmrj.com

/s/ Elisabeth M. McOmber

12248450.1